Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-358 (a)

In the Supreme Court of the United States

OCTOBER TERM, 1985

TYRONE KENNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioner, a public official, committed mail fraud in violation of 18 U.S.C. 1341 by depriving the public of its right to his honest and faithful services.

2. Whether the district court's instructions concerning the elements of a violation of the Hobbs Act, 18 U.S.C. 1951, were plainly erroneous.

3. Whether the charged mailings furthered petitioner's scheme to defraud.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Pereira v. *United States*, 347 U.S. 1 8

United States v. *Bohonus*, 628 F.2d 1167, cert. denied, 447 U.S. 928 5

United States v. *Gorny*, 732 F.2d 597 5

United States v. *Jannotti*, 673 F.2d 578, cert. denied, 457 U.S. 1106 and No. 83-1891 (Oct. 9, 1984) 7

United States v. *Mandel*, 591 F.2d 1347, aff'd, 602 F.2d 653, cert. denied, 445 U.S. 961 5

United States v. *Margiotta*, 688 F.2d 108, cert. denied, 461 U.S. 913 5

United States v. *Maze*, 414 U.S. 395 8

United States v. *McClelland*, 731 F.2d 1438, cert. denied, No. 84-6407 (June 10, 1985) 7

United States v. *O'Grady*, 742 F.2d 682 ..... 6, 7

United States v. *Rabbitt*, 583 F.2d 1014, cert. denied, 439 U.S. 1116 ..... 4, 5

Page

Cases—Continued:

United States v. *Sampson*, 371 U.S. 75 8

United States v. *Schmidt*, 760 F.2d 828, cert. denied *sub nom. Folak* v. *United States*, No. 84-1991 (Oct. 7, 1985) 6

United States v. *States*, 488 F.2d 761, cert. denied, 417 U.S. 909 5

United States v. *Swift*, 732 F.2d 878, cert. denied, No. 84-449 (Jan. 14, 1985) 7

United States v. *Young*, No. 83-469 (Feb. 20, 1985) 6

United States v. *Venneri*, 736 F.2d 995, cert. denied, No. 84-266 (Nov. 26, 1984) 5

Statutes and regulations:

Hobbs Act, 18 U.S.C. 1951 ..... 1, 4, 5

18 U.S.C. 1951(b)(2) 6

18 U.S.C. 1341 ..... 1, 3, 8

18 U.S.C. 1503 2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-358

TYRONE KENNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1985, and a petition for rehearing was denied on June 13, 1985 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on August 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on nine counts of mail fraud, in violation of 18 U.S.C. 1341, eleven counts of extortion and one count of conspiracy to commit extortion, in violation of 18 U.S.C. 1951, and one count of obstruction of justice, in violation of

18 U.S.C. 1503. He was sentenced to concurrent terms of five years' imprisonment on five of the mail fraud counts, to be followed by concurrent terms of three years' probation on the other counts. The court of appeals affirmed, except with respect to two of the extortion counts (Pet. App. 1a-13a).

1. The evidence at trial showed that during the relevant time period, petitioner served as the alderman and Democractic Party committeeman for the City of Chicago's third ward. As an alderman, petitioner was the elected representative of the ward on the city council and represented his constituents in their contacts with city agencies. As a committeeman, petitioner represented party members of his ward in city and county party organizations. Tr. 127-128, 175-176, 1102, 1291, 1295.[1]

The charges against petitioner stemmed from his acceptance of payments from Chicago residents in return for his assistance in securing for them either an electrician's license or a part-time sheriff position. For example, Fred Tyler paid $1,000 to petitioner (through an intermediary) to assure a passing grade on the electrician's examination after he had failed it the first time. When Tyler failed the examination a second time, he called petitioner to demand the return of his money. Petitioner assured Tyler that he would pass the examination the next time; petitioner also promised to speak with the mayor and another city official about the matter. Tyler nonetheless failed the examination again in 1976 and 1977. In 1978, Tyler paid petitioner $2,500 to ensure that he would pass the latest examination, but again he failed. Petitioner later returned $1,500 to Tyler. Tr. 904, 907-917, 956-958, 973-976. In a recorded conversation in

---

[1]Citations to the transcript are taken from the government's brief in the court of appeals.

1979, petitioner guaranteed that Tyler would pass the examination in exchange for an additional $1,500, which Tyler then paid. Tr. 928-929; 6/13/79 Tape Tr. 8-9.

Petitioner's acceptance of funds in return for securing part-time sheriff positions followed a similar pattern. The vast majority of these positions were filled on the recommendations of aldermen and committeemen. Tr. 116-117. In one instance, Murphy Palmer paid petitioner $300, ostensibly for typing a letter from petitioner to the sheriff's office. Palmer obtained his sheriff's position, and subsequently acted as an intermediary between petitioner and other applicants for the post. Tr. 599-603. On petitioner's behalf, Palmer collected between $1,000 and $2,000 from each applicant; twice, applicants paid petitioner directly. *E.g.*, Tr. 259-266, 443-458, 603-617. In a recorded conversation in 1981, petitioner instructed one of the applicants, who had been questioned by the FBI, not to " 'say anything to anybody.' " 12/21/81 Tr. 1-2, 4.

2. The court of appeals affirmed, except with respect to two of the extortion counts,[2] in an unpublished decision (Pet. App. 1a-13a). The court held that petitioner had violated the mail fraud statute, 18 U.S.C. 1341, because petitioner's "sale of his political influence clearly deprived the public of their right to impartial, unbiased, and honest decisions by their elected representative" (*id.* at 6a). In response to petitioner's argument that he had acted solely as a party official without responsibilities to the public, the court noted that no clear distinction could be made between his actions as an alderman and those as a party committeeman (*id.* at 5a). The court also held that the charged mailings, of fingerprint cards for the sheriff's applicants and of

---

[2]The court of appeals reversed with respect to these counts because of the absence of proof of an effect on interstate commerce (Pet. App. 12a).

notices of the electrician's examination, were "necessary to insure the victims that their payments were being rewarded" and thus furthered petitioner's scheme to defraud (*id.* at 10a). Finally, the court upheld the sufficiency of the evidence supporting petitioner's conviction for extortion in violation of the Hobbs Act, 18 U.S.C. 1951 (*id.* at 11a-12a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner argues first (Pet. 16-30) that his sale of political influence did not constitute mail fraud because his duties as an alderman did not include responsibility over the sheriff's office or the licensing of electricians. He contends that, while he was an alderman during the entire period in question, his influence arose solely from his position as a committeeman, which, he asserts, did not give rise to a duty to the public at large. In fact, however, the evidence demonstrated that petitioner's ability to exert power over the naming of part-time sheriffs and the granting of electricians' licenses arose in substantial part as a result of his position as an alderman and that the persons who paid him for political influence sought his assistance and dealt with him as an alderman. See, *e.g.*, Tr. 116-117, 119, 597-598, 615-616, 942. There was in any event "no brightline [*sic*]" (Pet. App. 5a) between petitioner's duties as an alderman and those as a committeeman: the evidence does not support petitioner's attempt to insulate his role as an alderman from the charged activities.

The court of appeals' decision does not conflict with *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). The defendant in *Rabbitt* was a state legislator. In return for a fee, he introduced an architectural firm to persons who might have been able to

secure governmental construction contracts for the firm (583 F.2d at 1020-1021). The court of appeals reversed the defendant's mail fraud convictions because the defendant "did not, in his official capacity, control the awarding of state contracts" (*id.* at 1026). Here, by contrast, the evidence showed that petitioner did have actual power, by virtue of his position as a public official, over the favors he bestowed.[3] The courts of appeals have uniformly concluded that the mail fraud statute applies to conduct such as petitioner's, which violates the duty of officials to provide faithful and honest services to the public, and this Court has consistently declined to review those decisions.[4] There is no reason for a different result here.

2. Petitioner argues next (Pet. 30-38) that his convictions for extortion in violation of the Hobbs Act, 18 U.S.C. 1951, for which he was sentenced to three years' probation, cannot stand in the absence of evidence demonstrating and a jury instruction requiring that he "induced" payments from his victims. Petitioner failed to object to the jury instructions on this ground at trial. Even if he were correct, the

---

[3]Although a tangible injury to the public is not required, see, *e.g.*, *United States* v. *Gorny*, 732 F.2d 597, 602 n.2 (7th Cir. 1984), that is present here as well. Unlike in *Rabbitt*, where the contracts were awarded on merit regardless of the defendant's acts (see 583 F.2d at 1026), petitioner's conduct plainly injured the public in a tangible fashion: the sheriff testified that he would not have accepted petitioner's recommendations for appointments had he known that they were conditioned on the applicants' payments to petitioner (Tr. 123, 159-163).

[4]See, *e.g.*, *United States* v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *Mandel*, 591 F.2d 1347, aff'd in relevant part, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *States*, 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974). Cf., *e.g.*, *United States* v. *Venneri*, 736 F.2d 995 (4th Cir. 1984) (deprivation of loyal and faithful services of employee violated mail fraud statute), cert. denied, No. 84-266 (Nov. 26, 1984); *United States* v. *Bohonus*, 628 F.2d 1167 (9th Cir.) (same), cert. denied, 447 U.S. 928 (1980).

error that he claims, which amounts to nothing more than a semantic quibble, did not "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice" (*United States* v. *Young,* No. 83-469 (Feb. 20, 1985), slip op. 15). In the absence of such plain error, there is no warrant for this Court's review.[5]

The Hobbs Act proscribes "the obtaining of property from another, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2). Petitioner's willful acceptance of money in exchange for his misuse of public office is similar in all material respects to conduct that has consistently been held to be within the statute. See cases cited in *United States* v. *O'Grady,* 742 F.2d 682, 689-690 (2d Cir. 1984) (en banc).

Contrary to petitioner's argument, the decision below does not conflict with *United States* v. *O'Grady, supra.* The Seventh Circuit has recently made it clear that its standard comports with the key requirement in *O'Grady* of a misuse of public office, whatever the actual form of words used in the instructions. *United States* v. *Schmidt,* 760 F.2d 828, 832 (1985), cert. denied *sub nom. Folak* v. *United States,* No. 84-1991 (Oct. 7, 1985). The Second Circuit in *O'Grady* similarly emphasized that rejection of its inducement formulation cannot be equated with rejection of the misuse of office requirement (742 F.2d at 689). Moreover, since *O'Grady* was decided this Court has denied certiorari in three Hobbs Act cases arising in circuits that, like the Seventh, have approved somewhat different verbal formulations from those set forth in *O'Grady* of the proper jury

---

[5]Moreover, petitioner failed to present this argument in his opening brief in the court of appeals, raising it for the first time in his reply brief. There is no indication in the court of appeals' unpublished decision that it even considered the claim.

instructions where a public official is charged with extortion under color of official right.[6]

In any event, the substance of the offense as defined by the instructions given in this case is not materially different from that set forth in *O'Grady*. The instructions here, which essentially required that each payment be a quid pro quo for petitioner's corrupt use of office (see Pet. 37), were if anything more favorable to the defense than the *O'Grady* standard, which does not require such a quid pro quo (see 742 F.2d at 688-689). Moreover, petitioner's conduct plainly satisfied the inducement standard described in *O'Grady*, where the court of appeals recognized that "[p]roof of a request, demand or solicitation, no matter how subtle, will establish wrongful use of public office" (*id.* at 691) and that "the government is not required to prove that the public official demanded or directly solicited the benefits received" (*id.* at 688-689). In a concurring opinion joined by a majority of the judges, the court in *O'Grady* also held that inducement may be inferred from "repeated acceptances over a period of time of substantial benefits" (*id.* at 694 (Pierce, J., concurring)). Judged by these standards, there was ample evidence that petitioner, acting through political operatives, repeatedly induced payments in exchange for sheriff appointments and assurances of passing grades on the electrician's examination. Nothing more is required.

3. Finally, petitioner contends (Pet. 38-44) that the charged mailings did not further his scheme to defraud. The court of appeals correctly rejected this argument: the mailing of fingerprint cards to the applicants for sheriff positions and examination notices to the aspiring electricians

---

[6] *United States* v. *McClelland*, 731 F.2d 1438 (9th Cir. 1984), cert. denied, No. 84-6407 (June 10, 1985); *United States* v. *Swift*, 732 F.2d 878 (11th Cir. 1984), cert. denied, No. 84-449 (Jan. 14, 1985); *United States* v. *Jannotti*, 673 F.2d 578 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982) and No. 83-1891 (Oct. 9, 1984).

were "for the purpose of executing" the scheme to defraud under 18 U.S.C. 1341 because they were "necessary to insure the victims that their payments were being rewarded" (Pet. App. 10a). This is more than sufficient to bring the mailings within the statute, which does not require "the use of the mails as an essential element" of the fraud. *Pereira* v. *United States,* 347 U.S. 1, 8 (1954). Moreover, contrary to petitioner's contention (Pet. 43), the fact that the mailings took place after he had received funds from his victims does not in itself make his conduct lawful. See, *e.g., United States* v. *Sampson,* 371 U.S. 75 (1962).[7] Petitioner's reliance (Pet. 39, 40) on *United States* v. *Maze,* 414 U.S. 395 (1974), is misplaced. There, unlike here, the mailings "increased the probability that [the defendant] would be detected and apprehended" (*id.* at 403), and the defendant "probably would have preferred" (*id.* at 402) that the mailings had never taken place.

---

[7]The question whether certain mailings were in furtherance of a scheme to defraud is currently before the Court in *United States* v. *Lane,* No. 84-744 (argued Oct. 9, 1985). In light of the substantially different facts on which the cases arise, there is no need to hold this petition for the decision in *Lane*: whether or not mailings of insurance forms to a defrauded insurance company furthered the defendants' scheme in *Lane,* the evidence was plainly sufficient here to demonstrate that the mailing of fingerprint cards and examination notices—both essential steps in the process by which the victims were to obtain their desired positions—furthered petitioner's scheme to defraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

OCTOBER 1985